IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 788 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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GH PRAJAPATI

Versus

JB BHATT

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Appearance:

MR DC DAVE for Petitioner

MR SR BRAHMBHATT for Respondent No. 1

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CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 16/03/2001

CAV JUDGEMENT

1. This is an appeal under Section 96 read with Order 41 of the Civil Procedure Code, 1908 (for short, the "Code"), challenging the judgment and decree dated 31st December, 1994 recorded by the learned Civil Judge

(SD), Anand in Special Civil Suit No. 185/1990, under which the learned Civil Judge decreed the suit of the respondent - original plaintiff and directed the appellant - original defendant to hand over peaceful and vacant possession of the property in dispute between the parties in the suit. The learned trial Judge further directed the appellant - original defendant to pay mesne profit at Rs. 400/- p.m. from the date of the suit till the date on which he actually hand over the possession of the property to the respondent - original plaintiff.

2. It appears from the record that the respondent original plaintiff instituted the aforesaid suit before the learned Civil Judge (SD) at Anand for possession of the property in question. The suit was resisted by the present appellant by filing written statement at ex. 19. Thereafter, issues were framed and matter was taken up for recording of evidence.

3. It has come on record that the present appellant being the original defendant had also instituted a suit being Civil Suit No. 66/87 against the present respondent - original plaintiff for certain declaration and injunction and there the present appellant claimed that he was a tenant in respect of the property in question. There was some inter locutory application under Order 39, Rule 2 of the said Code. The matter had gone to the District Court from the said order of the Civil Court under Order 43 of the said Code. Thereafter, the matter had come to this Court in Revision under Section 115 of the said Code.

4. Ultimately, the present appellant was allowed to continue in possession of the property in question pending hearing and disposal of the suit being Civil Suit No. 66/87 and a condition was attached that the appellant shall go on depositing the amount of Rs. 400/p.m. regularly.

5. It appears that there was some default on the part of the appellant in depositing the said amount before the Court regularly in the aforesaid suit as per the order of the Court.

6. Considering that default of the present appellant in the said suit, the learned trial Judge conducting this suit came to a decision that the appellant had failed to comply with the direction of the Court in that suit with respect to the deposit of Rs. 400/- every month regularly and hence the learned Trial Judge struck off the defence of the appellant in the suit and on

appreciation of the evidence of the respondent, passed a decree in favour of the respondent and against the appellant as aforesaid.

7. Feeling aggrieved by the said judgement and decree of the trial Court, the present appellant has preferred this appeal before this Court. It has been mainly contended here that the trial Court had committed illegality in striking out the defence of the appellant. That at least some opportunity ought to have been extended to the appellant for the deposit of money. That since the defence of the appellant was struck off, prejudice has been caused to the interest of the appellant in respect of the immovable property in his possession and therefore, the judgement and decree of the trial Court are illegal and erroneous and deserve to be set aside. Therefore, he has prayed that the said judgement and decree of the trial Court be quashed and set aside.

8. On receiving the appeal, it was admitted on 1.5.1995. Notice was issued to the respondent and Mr. S.R. Brahambhatt appears before the Court on behalf of the respondent in response to the service of notice on the respondent.

9. I have heard the learned advocates for the parties and have perused the papers.

10. Now, it is very clear that the defence of the appellant in the suit has been struck off by the trial Court on the ground that the appellant did not comply with the direction of the Court in Civil Suit No. 66/87.

11. Now, it is required to be considered that the said direction of the regular deposit of Rs. 400/- p.m. was a direction or order of the Court in connection with Civil Suit No. 66/87. There was no such direction or order of the Court with respect to the Special Civil Suit No. : 185/90, I am of a clear decision that simply even if there was an order in Civil Suit No. 66/87 for regular deposit of Rs. 400/- p.m. and if that order was not complied with in Civil Suit No. 66/87, then, the defence of the appellant could not be struck off in Special Civil Suit No. 185/90. Admittedly, there was absolutely no order passed in Sp. Civil Suit No. 185/90 for deposit of the said amount of Rs. 400/- p.m. In my opinion, the order passed in Civil Suit No. 66/87 cannot be projected in Sp. Civil Suit No. 185/90. In other words, the order of the learned trial Judge striking out the defence of the appellant in Sp. Civil Suit No.

185/90 for non compliance of the order passed in connection with Civil Suit No. 66/95 is patently illegal, erroneous, uncalled for, unwarranted and even without jurisdiction.

12. Another aspect of the case is that before passing such an order, no show cause notice appears to have been issued to the appellant providing him an opportunity to show cause as to why order of striking off his defence should not be passed against the appellant. Without any notice and without any opportunity to the appellant to meet with the said requirement of the Court, his defence has been struck off, which would clearly mean that the order of the trial Court striking off defence of the appellant in Sp. Civil Suit No. 185/90 is again a fragrant violation of the principle of natural justice.

13. Any way, I am of the view that the learned trial Judge has committed serious illegality in striking out the defence of the appellant.

14. If, we go through the judgement, it is clear that when the defence was struck off, the appellant was not permitted to cross examine the witnesses of the respondent. The appellant was not permitted to lead evidence. The appellant was also not permitted to argue the matter on behalf of the appellant. Therefore, the appellant was not permitted to participate or to defend the suit. Naturally, when the respondent and his witnesses were not cross examined by or on behalf of the appellant and when the appellant was not permitted to lead evidence and when he was not permitted to argue in defence of his case, the entire defence of the appellant could not come forward on the record of the trial Court and the matter almost proceeded ex-parte against the appellant. This has seriously prejudiced the interest of the appellant and therefore, it has resulted in miscarriage of justice, when a decree was passed against the appellant for his eviction from the immovable property. It is more so when his suit is pending before the trial Court itself, in which, he has made his claim that he is a tenant in the said property. The order striking out the defence of the appellant has taken away the valuable right of the appellant of contesting the suit, of cross examination of the witnesses of the respondent and of producing evidence in support of his case.

15. Considering the aforesaid aspect of the case, it is apparently clear that the order of the trial Court striking out the defence of the appellant in Sp. Civil

Suit No. 185/90 is clearly illegal and when the said order is illegal, the resulting effect is that the judgement and decree recorded by the trial Court after striking out the defence of the appellant are also illegal and erroneous, since they have been recorded without giving a reasonable opportunity to the appellant to lead evidence, to cross examine the witnesses of the respondent and to address the Court in order to put forward the case of the appellant in defence of the suit.

16. In the aforesaid view of the matter, it is apparently clear that the judgement and decree of the trial Court are illegal and erroneous and deserve to be set aside.

17. At the same time, considering the aforesaid facts and circumstances of the case, when the judgement and decree are illegal and hence deserve to be set aside, the only alternative left to this Court is to remand the matter to the trial Court for proceeding ahead from the stage of evidence. It is made clear that whatever evidence produced before the trial Court shall be taken into account and the respondent will be at liberty to adduce further evidence in support of his case. At the same time, the appellant will be at liberty to cross examine the witnesses of the respondent already examined and to be hereafter examined and to lead oral and documentary evidence and to advance arguments before the trial Court.

18. Mr. Brahambhatt arguing the matter on behalf of the respondent has submitted that under Order 8 of the Code, the Court can pronounce judgement and judgement would to be followed by a decree. The present judgement has not been pronounced by invoking powers and jurisdiction under Rule 1, 5 and 10 of Order 8 of the Code. Therefore, this argument will not hold field in the present matter. Thereafter, in the present matter, the written statement was already there on record and therefore, there was no question of invoking the aforesaid powers and jurisdiction of the Court. Therefore, also this argument cannot come to the rescue of the respondent.

19. An attempt was made to argue that even when defence is struck off, the appellant could avail of opportunity to cross examine the witnesses of the respondent in accordance with the observations made in case of MODULA INDIA VS. KAMAKSHYA SINGH DEO reported in AIR 1989 SC 162. Firstly, there was no order striking out defence of the appellant under the permission of the

Bombay Rent Act, 1947 and even this limited opportunity was not extended to this appellant. Hence, this decision does not go to the rescue of the appellant.

20. With respect to the order of payment of Rs. 400/- p.m., he has made it clear that the said order was passed in another suit and not in the present suit, which is the subject matter of this appeal. It is also contended by him that the said matter was carried in appeal, which is hardly relevant for deciding the present appeal.

21. The fact remains that the suit in question was decided almost ex-parte by not allowing the appellant to cross examine the witness of the respondent by not allowing him to lead evidence and by not allowing him to advance argument in support of his case before the trial Court. Therefore, it was clear violation of even principles of natural justice.

22. So, on one hand, the trial Court had committed serious illegality in adopting the above said procedure by not allowing the appellant to cross examine the witness of the respondent by not permiting the appellant to lead evidence and by not permiting the appellant to advance arguments in support of his case before the Civil Court. Therefore, the entire approach and consequential judgement and decree of the trial Court are illegal and erroneous and therefore, they deserve to be quashed and set aside.

23. In the aforesaid view of the matter, the judgement and decree of the trial Court are illegal and erroneous and they are required to be set aside.

24. Hence, in the aforesaid facts and circumstances of the case, this appeal is allowed. The judgement and decree of the trial Court are set aside and the Sp. Civil Suit No. 185/90 is remanded back to the trial Court for trial according to law. The learned trial Judge will certainly dispose of this old matter as early as possible by keeping in mind the observations made hereinabove.

25. Considering the facts and circumstances of the case, since the matter is being remanded back to the trial Court, it is in the fitness of things to leave the parties to bear their own costs.

(D.P. Buch, J.)

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